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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

GEORGE R. ARIYOSHI, Governor, STATE OF HAWAII, et al.,
Petitioners,

v.

SELWYN A. ROBINSON, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF ALASKA, CALIFORNIA, MONTANA, NEVADA, NORTH DAKOTA, OREGON, UTAH, WASHINGTON AND WYOMING AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF THE AMICI CURIAE

The *amici* States have a compelling interest in this case.

All of them have comprehensive water rights systems that attempt to accommodate the diverse and conflicting claims of public agencies, private parties, and the people as a whole in this vital public resource. The touchstone for the sovereign stewardship over the distribution of water, as well as for the judicial articulation of principles of state water law, is the principle that this precious public resource should be put only to reasonable and beneficial use. This is particularly true in the arid

and semi-arid States of the West, where the articulation of principles of state water law is animated by the "critical [problem] of scarcity of water" (*Colorado River Water Conservation District v. United States* (1976) 424 U.S. 800, 804).

It was this principle of reasonable and beneficial use that underlay the decision of the Supreme Court of Hawaii here. It viewed the arguments of the private parties as leading to the conclusion that "there existed no apparent common law restraint upon the right of private parties to drain rivers dry for whatever purposes they saw fit." (*Robinson v. Ariyoshi* (Haw. 1982) 658 P.2d 287, 311.) In rejecting these arguments, the Supreme Court of Hawaii likened the State's stewardship over the allocation of its waters to the public trust held by the States in the beds of navigable waterways, thus recognizing a concept that has been set forth in the water rights decisions of other States (e.g., *United Plainsmen v. North Dakota State Water Conservation Comm'n* (N.D. 1976) 247 N.W.2d 457, 460-463; *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 425, 437-438, 445, 447 [189 Cal.Rptr. 346, 658 P.2d 709], cert. den., ___ U.S. ___, 104 S.Ct. 423). This Court has itself held that this public trust is governmental in nature and cannot be alienated. (*Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387, 452.)

The decision of the Court of Appeals for the Ninth Circuit, however, nullified the decision of the Supreme Court of Hawaii, concluding that its articulation of state water law constituted a "taking" of "vested" property rights without just compensation. (*Robinson v. Ariyoshi* (9th Cir. 1985) 753 F.2d 1468, 1474.) This conclusion was based upon the Ninth Circuit's own independent interpretation on several matters of state law: the import of prior Hawaii case law, the meaning of the decision of the Supreme Court of Hawaii in the case under review, and the manner in which that decision would be applied in future state court cases. (See 753 F.2d at pp. 1473-1474.) These interpretations of state law conflicted with those of the Supreme Court of Hawaii on the very same questions.

The decisions of state courts defining sovereign rights in public trust resources have been attacked with increasing frequency in recent years based on the "taking" argument that proved

successful below. (E.g., *National Audubon Society v. Superior Court, supra*, 33 Cal.3d 419, cert. den., ___ U.S. ___, 104 S.Ct. 413 (water rights allocation must consider environmental impacts on trust resources; see Pet. for Cert., heading III, U.S. 83-300); *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515 [162 Cal.Rptr. 327, 606 P.2d 362], cert. den., 449 U.S. 840 (public trust interest impliedly reserved in deeds to lands beneath waters of San Francisco Bay; see Pet. for Cert., heading 2, U.S. 79-2008).)

These assertions have been based principally on what was the sole authority offered by the Ninth Circuit here: a concurring opinion by Justice Stewart in *Hughes v. Washington* (1967) 389 U.S. 290, 294, 296-297, which suggested that property owners enjoy constitutional protection against "unpredictable" changes in state court case law.

The Ninth Circuit's decision will fundamentally alter the ability of state supreme courts to define, as a matter of state law, public and private rights in public trust resources. For that reason, the *amici* States strongly support Hawaii's petition and ask that this Court accept the case and reverse the lower court's decision.

INTRODUCTION

The sovereign governmental interest of the States in the allocation of water is of particular importance to the arid and semi-arid States of the West. (See *Colorado River, supra,* 424 U.S. at p. 804.) In constitutional and statutory provisions, and by court decisions, various western States have recognized the established common law concept that flowing water, like light and air, is *publici juris*—the property of the public.[1] The reference is not to an interest or title in the proprietary sense, but rather to a

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[1] The concept has been recognized in the English cases (e.g., *Wood v. Waud* (1849 Ex.) 154 Eng.Rep. 1047, 1058; *Mason v. Hill* (1833) 110 Eng.Rep. 692), as well as by this Court (*United States v. Gerlach Live Stock Co.* (1950) 339 U.S. 725, 744-745 (tracing the concept to the Institutes of Justinian)). Articulations of the concept in state constitutions, statutes, and case law are collected in 1 Hutchins, Water Rights Laws in the Nineteen Western States (1971) pp. 3-7.

State's power, in a sovereign capacity as the representative of all of its people, to assure that the common rights of all are protected.[2]

As pointed out by the Supreme Court of Hawaii here, this sovereign governmental interest is akin to the public trust held by the States in the beds of navigable waterways, and cannot be alienated.

In recognition of the strong sovereign interest of the States in this area, the federal government has traditionally deferred to the States in their development of separate water law regimes designed to meet their own particular needs. (See, e.g., *California v. United States* (1978) 438 U.S. 645, 653, 663.)

It is therefore particularly surprising that the lower court chose this area of state property law in which to establish the doctrine that state supreme courts, in declaring what state property law is, are subject to having their decisions invalidated in this Court or in the lower federal courts based on the allegation that their declaration of state law has "taken" vested private property rights in violation of the Fifth and Fourteenth Amendments.

What is equally disturbing, the lower court brushed aside well-established principles of this Court concerning ripeness and justiciability in its haste to reach and decide this issue of "judicial taking". The issue should never have been reached.

Rather than heed these principles, which counsel and require judicial restraint, the lower court instead proceeded to characterize, define, and limit the content of Hawaii's water law. It reached its own independent conclusions concerning the import of prior state case law concerning Hawaiian water rights, which conclusions were directly at odds with the Supreme Court of Hawaii's own characterization of prior Hawaii law. It also reached its own independent conclusions concerning the interpretation and future application of the state supreme court's opinion, again in flat contradiction of the state court's own interpretation of the decision which it had rendered. Finally, it forestalled any future development or case-by-case application of the principles set

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[2] See *id.*, at p. 6.

forth in the state supreme court's decision by declaring that the decision was invalid as a "taking" of vested rights.

In response to past arguments that a particular decision would cause economic dislocations because of past reliance on earlier case law, state courts have applied recognized institutional rules (for example, prospective overruling) to ease any perceived departure from past precedent, or have expressly left resolution of such problems to future litigation. (E.g., *City of Berkeley v. Superior Court, supra,* 26 Cal.3d 515, 533-536 (decision only partially retroactive); *National Audubon Society v. Superior Court, supra,* 33 Cal.3d 419, 447-448, 452 (competing interests to be resolved in subsequent phase of litigation).) Here, for the first time, the invocation and application of such institutional rules has been rendered superfluous by the interposition of a constitutional bar to "change" (as perceived by the federal courts) in state court case law.

The stultifying and intrusive impact that the principle announced below would have upon the evolutionary, case-by-case development of a State's common law is evident. The decision is particularly disturbing to the *amici* States because it has been applied in an area in which, historically and by definition, the sovereign has retained the governmental right to insist that water—a vital public resource—be put only to reasonable and beneficial uses that are consistent with the interests of the public as a whole.

For that reason, the *amici* urge that this Court grant the petition and summarily reverse, or, in the alternative, set the case for plenary consideration.

ARGUMENT

I. THIS COURT SHOULD GRANT THE PETITION BECAUSE THE LOWER COURT ERRONEOUSLY DECIDED AN ISSUE THAT IS NOT RIPE FOR DECISION

Even assuming that court decisions can "take" property, the Ninth Circuit acted prematurely in reaching and deciding that issue here.

This Court has held in recent cases that the question whether state action has resulted in an unconstitutional "taking" of property is not ripe for judicial consideration until the State has actually imposed specific, concrete limitations on the property interest. (E.g., *Williamson County Regional Planning Comm'n v. Hamilton Bank* (1985) ___ U.S. ___, 105 S.Ct. 3108, 3117-3121; *Agins v. City of Tiburon* (1980) 447 U.S. 255, 262-263.)

Here, the general principles of Hawaiian water law set forth in *McBryde Sugar Company, Limited v. Robinson* (Haw. 1973) 504 P.2d 1330, have yet to be applied to a specific situation. The Supreme Court of Hawaii, in answering the questions posed by the Ninth Circuit, declared that the *McBryde* decision does not, in itself, result in a limitation upon any specific landowner's water rights, and that any such limitations will only be considered in future proceedings, in which traditional equitable principles will be applied, along with the "public use" doctrine, to determine whether a particular diversion is permissible. (See *Robinson v. Ariyoshi, supra*, 658 P.2d 287, 294-295.)[3]

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[3] In the answers to the certified questions, the Supreme Court of Hawaii stated that:

> "[W]e did not [in *McBryde*] actually enjoin or explicitly prohibit the diversion of water from the watershed. Rather, we sought only to establish that these private usufructory interests were not so broad as to include any inherent enforceable right to transmit water beyond the lands to which such private interests appertained.
>
> "We did not say that such transfers are prohibited as a matter of law, for *McBryde* did not discuss and therefore cannot be understood to be conclusive of the circumstances under which a private party or the State could obtain injunctive relief against unsanctioned transfers. And, even in circumstances where some relief would be appropriate, the issuance of any injunction would of course be subject to all of the considerations that serve to limit equitable relief. These limiting doctrines include estoppel, laches, and most particularly with respect to wrongful diversion of water, the public use doctrine as applied to our unique situation. See, *Reppun v. Board of Water Supply*, 656 P.2d 57 (Haw. 1982) [holding that the public use doctrine may validate an otherwise wrongful diversion].

Therefore, *McBryde* does not actually limit any landowner's existing water right. Such limitations will only be imposed, if at all, in future proceedings, as the general water law principles established in *McBryde* are measured against each landowner's equitable interest and the public use doctrine.

The ripeness doctrine applies with particular force here because even the general principles announced in *McBryde* are subject to further definition and refinement in the context of their future application to particular sets of facts. (See, e.g., *Reppun v. Board of Water Supply* (Haw. 1982) 656 P.2d 57, 59, 72 (limiting broad language in *McBryde* concerning the nature of riparian rights, and noting that the doctrine will continue to evolve).)

In light of the decisions of this Court, which require that a challenged regulation must be applied to a specific factual situation before a taking claim can properly be assessed, the lower court should never have reached the question whether the decision in *McBryde* constituted a "taking" of vested rights. The error being clear, the decision below should be summarily reversed on this ground alone, quite apart from the merits of the question whether court decisions can "take" property.

"Thus we take issue with the federal district court's characterization of *McBryde* as 'restraining the free diversion of surface waters for use outside the lands of the plaintiffs to which they are appurtenant.' [Citation omitted.] *McBryde* merely established that there was no *right* on the part of the plaintiffs to benefit from such diversions. But, as was the case in our pre-existing law governing the transport of water, [footnote omitted] diversions will be restrained only after a careful assessment of the interests and circumstances involved indicates a need for restraint. A delineation of these interests and circumstances were not before us in *McBryde* and we did not order the cessation of any diversions. Consistently with our statutory prerogative, we merely defined the appropriate scope of the rights established in the case and left the actual enforcement of these limitations to appropriate subsequent actions brought by the parties, including the State." (Emphasis in the original.) (658 P.2d 287, 294-295.)

II. IN CONCLUDING THAT HAWAII HAD "TAKEN" PROPERTY BY JUDICIAL DECISION, THE LOWER COURT IGNORED BOTH THE UNSETTLED NATURE OF HAWAII WATER LAW AND SUPREME COURT CASES HOLDING THAT COURTS, IN DECLARING WHAT THE LAW IS, ARE NOT SUBJECT TO "TAKING" CLAIMS

Putting aside the infirmities of the lower court decision on ripeness grounds, its determination that the Supreme Court of Hawaii committed a "judicial taking" is supported neither by the facts nor by the decisions of this Court, which establish that courts are not subject to "taking" claims in the exercise of their law-declaring function.

A. The Lower Court's Premise That *McBryde* Effected a "Major Change" in Hawaii Law Conflicts With the Hawaii Supreme Court's Conclusion That Prior Cases Were in Conflict and the Law Unsettled

The premise for the lower court's legal conclusion that *McBryde* constituted a "judicial taking" is its determination, after its own independent review of state case law, that *McBryde* effected a "major change" in state water law. (753 F.2d 1468, 1471.) In making this determination, the Ninth Circuit completely ignored the state supreme court's contrary conclusion on that very question, which the court of appeals had expressly requested. (See *Robinson v. Ariyoshi*, *supra*, 658 P.2d 287, 294, 306-309.)

In an exhaustive review of prior case law, the Supreme Court of Hawaii concluded that the cases were in conflict, that the law was unsettled, that confusion existed concerning the issues of water law presented for decision, and that a decision harmonizing the conflicting precedents was necessary. (*Ibid.*) The state court pointed out that the briefs of the parties themselves reflected this conflict and uncertainty. (*Id.*, at p. 309.) In such circumstances, there was no basis for concluding, in the words of Justice Stewart's concurring opinion in *Hughes* (389 U.S. 290, 296-297), that there had been an "unpredictable" change in state water law. Precisely because prior law was unsettled, concerned parties, prior to *McBryde*, could not comfortably predict what the Hawaii Supreme Court's determination would be concerning these issues.

Here, too, the lower court had no occasion to reach the issue that it decided. The predicate for such a decision—a "major change" in state water law—was absent. Thus, even assuming that judicial declarations of state property law can "take" property, and further assuming that the standard for whether such a taking has occurred is simply the predictability of the result, no such taking was established here.

B. The Conclusion That Courts, in Declaring Law, Can "Take" Property Conflicts With Supreme Court Precedent Directly to the Contrary

Under our federal system, the definition of "property" depends on state law. (*Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.* (1977) 429 U.S. 363, 378; *Davies Warehouse Co. v. Bowles* (1944) 321 U.S. 144, 155.) And state courts, no less in the area of property law than in other areas of state law, have the discretion to overrule past decisions in order to correct perceived error.

The argument that a court decision overruling a prior precedent regarding state property law constitutes a prohibited taking of property has been repeatedly rejected by this Court. (*Tidal Oil Co. v. Flanagan* (1924) 263 U.S. 444, 450; *Central Land Co. v. Laidley* (1895) 159 U.S. 103, 112; see *Brinkerhoff-Faris Co. v. Hill* (1930) 281 U.S. 673, 680, 681, fn. 8; *Great Northern Ry. v. Sunburst Co.* (1932) 287 U.S. 358, 365; but cf. *Muhlker v. New York & Harlem Railroad Co.* (1905) 197 U.S. 544; *Demorest v. City Bank Co.* (1944) 321 U.S. 36; *Fox River Paper Co. v. Railroad Commission* (1927) 274 U.S. 271.)[4]

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[4] *Muhlker* can be read as saying that courts are sometimes subject to constitutional inhibitions in reconsidering earlier cases upon which parties may have relied to their detriment. The case has not been so construed by this Court, however. The Court has treated *Muhlker* as solely a Contract Clause case. (*Tidal Oil Co. v. Flanagan, supra,* 263 U.S. 444, 452-453 (state court judgment alone, without a statute, cannot impair contract); *Ross v. Oregon* (1913) 227 U.S. 150, 163-164.)

Demorest and *Fox River* involved challenges to state legislative enactments that were alleged to constitute takings of property. Although rejecting the challenge in both instances, this Court stated that a state

In *Tidal Oil, supra,* a case where a deed apparently valid when executed had later been held invalid in light of a reinterpretation of applicable law, this Court stated:

> "The parties to this action have been fully heard in the state court in the regular course of judicial proceedings and in such a case the mere fact that the state court reversed a former decision to the prejudice of one party does not take away his property without due process of law. This was expressly held in the case of *Central Land Co. v. Laidley*, 159 U.S. 103, 112." (263 U.S. at p. 450.)

This result was confirmed in *Brinkerhoff-Faris, supra*, a case in which Justice Brandeis explained the underlying rationale as follows:

> "The process of trial and error, of change of decision in order to conform with changing ideas and conditions, is traditional with courts administering the common law. Since it is for the state courts to interpret and declare the law of the State, it is for them to correct their errors and declare what the law has been as well as what it is. State courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of the earlier decisions." (281 U.S. at p. 681, fn. 8.)

This distinction between the courts and the other branches of government for purposes of taking liability is well-grounded in the inherent nature of what courts do and what gives legitimacy to their workproduct.

The courts do not function as an instrument of the popular will, nor as the agent of any particular segment of society, governmental or private. Rather, their function is to act as neutral

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court determination of the related subsidiary issue of what the claimant's property rights were under state law could not be used as a means of evading federal jurisdiction over the claim that a state statute had taken property. The Court stated that it would, in determining whether such an evasion had been attempted, assess whether the state court's determination of state property law had a "fair or substantial basis".

arbiters of the disputes that are placed before them in the form of particular cases. Their decisions may redound to the benefit or detriment of the other branches of government, or indeed may have no effect on government at all; and this is a generalization that holds true in cases involving the articulation of property law principles: an alleged "change" in such principles may "hurt" or "help" government, or may have no effect upon it at all. There is thus no essential identity of interest between the courts and other branches of the state or federal governments.

Nor does the nature of a court's function confer upon it a free-ranging charter to implement *its* concept of what the law should be, in contradistinction to the role of a legislature. The Supreme Court of Hawaii here, for instance, although it thought that the "taro cultivation" test for allocation of water rights was a "quaint" and perhaps inappropriate modern-day test for conferral of such rights, nonetheless recognized that such a standard was indisputably part of the law of Hawaii, and that any change would be solely for the legislature to make. (*McBryde, supra*, 504 P.2d 1330, 1340, fn. 15.)

It is of course true that courts, including this Court, occasionally make decisions that arguably will cause unanticipated and adverse economic consequences among persons who may have relied on an earlier contrary precedent. (See, e.g., *Garcia v. San Antonio Metropolitan Transit Authority* (1985) ___ U.S. ___, 105 S.Ct. 1005, overruling *National League of Cities v. Usery* (1976) 426 U.S. 833; cf. *County of Oneida v. Oneida Indian Nation* (1985) ___ U.S. ___, 105 S.Ct. 1245, 1272 (voiding 1795 deed from Indian tribe, thereby "upset[ting] long-settled expectations").) But this truism does not render either this Court or other courts subject to taking claims under the Fifth Amendment.

The courts, both state and federal, have developed their own institutional rules for easing any such perceived hardships. (See, e.g., *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co,, supra*, 429 U.S. 363, 381-382 (overruling case in property law area decided several years earlier); *Chevron Oil Co. v. Huson* (1971) 404 U.S. 97, 105-109 (prospective overruling); *Simpson v. Union Oil Co.* (1969) 396 U.S. 13 (denying request for

prospective overruling); *City of Berkeley v. Superior Court, supra*, 26 Cal.3d 515, 533-536 (overruling prior case that had held that deeds to lands beneath San Francisco Bay conferred absolute title; contrary conclusion that public trust interest impliedly retained applied by court only to lands still wet, where reliance had been minimal).) Indeed, in this very case, the Supreme Court of Hawaii mentioned possible future application of estoppel, laches, and the public use doctrine as mitigating principles that could blunt or avoid any adverse economic impacts of its decision. (*Robinson v. Ariyoshi, supra*, 658 P.2d 287, 294-295.)

The lower court's decision would render superfluous such devices for softening the impact of any alleged departure from past precedent. Its decision absolutely forbids a court, as a matter of constitutional law, from departing from past precedent if to do so would injure "vested" rights.

III. ASSUMING THAT COURT DECISIONS CAN "TAKE" PROPERTY, NO SUCH TAKING WAS ESTABLISHED HERE

Even assuming, contrary to the above arguments, that the Ninth Circuit properly reached the issue, and further, that state court declarations of common law in the area of water rights are subject to "taking" claims, no taking was established here. If there is to be Taking Clause review in this area, a balancing test should be applied, by analogy to this Court's decisions involving state regulations that restrict the use of private property. No such balancing test was applied by the Ninth Circuit here. Nor could such a test have been applied, given the unanswered questions that exist concerning concrete application of the general principles set forth in *McBryde*.

In dealing with alleged regulatory takings, this Court has adopted a balancing test—under which public needs are weighed against private interests and expectations—in determining whether state regulation of property rights constitutes an unconstitutional "taking" of such rights. (See, e.g., *Williamson County Regional Planning Comm'n v. Hamilton Bank* (1985) ___ U.S. ___, 105 S.Ct. 3108; *Ruckelshaus v. Monsanto Co.* (1984) ___ U.S. ___, 104 S.Ct. 2862; *Agins v. City of Tiburon*

(1980) 447 U.S. 255; *Kaiser Aetna v. United States* (1979) 444 U.S. 164; *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104.)

In *Penn Central,* the Court stated that, "quite simply, [the Court] has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government rather than remain disproportionately concentrated in a few persons." (438 U.S. at p. 124.) Generally, the Court stated, it must consider the "economic impact of the regulation" on the property owner, particularly the extent to which the regulation "has interfered with distinct investment-backed expectations," and must balance these factors against the "character of the governmental action." (*Ibid.*) An unconstitutional taking is more likely to be found, the Court stated, where the state action constitutes a "physical invasion" of the property interest than where the interference arises from a "public program adjusting the benefits and burdens of economic life to promote the common good." (*Ibid.*)[5]

In *Pruneyard Shopping Center v. Robins* (1980) 447 U.S. 74, for instance, this Court applied the balancing test in reviewing a state constitutional provision that had been interpreted by the state supreme court to entitle citizens to exercise free expression and petition rights on shopping center property. The question was whether the state constitutional provision effected a "taking" of the shopping center owner's property rights in violation of the Fifth and Fourteenth Amendments. (*Id.,* at pp. 76-77, 82.) This Court applied the balancing test and affirmed, concluding that "there is nothing to suggest that preventing the appellants from

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[5] A similar balancing test has been applied in determining whether state legislative action unreasonably impairs contracts in violation of the Contract Clause of the Constitution. (See U.S. Const., art. I, §10, cl. 1; *Home Building & Loan Assn. v. Blaisdell* (1934) 290 U.S. 398; *United States Trust Co. v. New Jersey* (1977) 431 U.S. 1; *Energy Reserves Group, Inc. v. Kansas Power & Light Co.* (1983) 459 U.S. 400, 410-413.)

prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center." (*Id.*, at p. 83.)

If any such balancing test were to be applied to state judicial decisions that give content to local water law, presumptive weight would have to be accorded the sovereign state interest is assuring that water allocation decisions comport with the interests of the people as a whole.

This Court has held that the States, as an attribute of sovereignty, reserve the right to exercise sovereign ownership and control over their navigable waters and underlying beds. (See, e.g., *Pollard's Lessee v. Hagan* (1845) 44 U.S. (3 How.) 212, 224-229; *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., supra,* 429 U.S. 363, 370-376.) Further, the common law of the various States, following the English common law, has generally recognized that flowing water, like light and air, is *publici juris*; that is, it is owned by the whole community and thus cannot be privately owned. (See, e.g., *United States v. Gerlach Live Stock Co.* (1950) 339 U.S. 725, 744-745; *Eddy v. Simpson* (1893) 3 Cal. 249, 252; *Gould v. Eaton* (1897) 117 Cal. 539; *Mason v. Hill* (1833) 110 Eng.Rep. 692; *Wood v. Waud* (1849 Ex.) 154 Eng.Rep. 1047, 1058; 1 Wiel, Water Rights in the Western States (3d ed. 1911) pp. 13-21 (hereinafter "Wiel").) Under this principle of common ownership, the States are deemed to hold navigable waters and the lands beneath them in trust for certain public uses, principally navigation, commerce, fisheries, and the preservation of recreational and environmental values. (*Illinois Central Railroad v. Illinois, supra*, 146 U.S. 387; *National Audubon Society v. Superior Court, supra*, 33 Cal.3d 419, 435-437.) Regarding the waters themselves, this public trust responsibility is not limited to navigable waterways. (See *United Plainsmen v. North Dakota State Water Conservation Comm'n, supra*, 247 N.W.2d 457, 460-463; *National Audubon Society, supra*, 33 Cal.3d at pp. 425-426, 434, 437, 441; *Robinson v. Ariyoshi, supra*, 658 P.2d 287, 310.)

Thus, the States possess a sovereign governmental interest in their waters that is different from and greater than their regulatory powers over ordinary species of property. Since the States retain a sovereign interest in water, a landowner acquires a

different interest in water than in the appurtenant lands. (See, e.g., Wiel, at pp. 13-21.) A landowner's water rights are usufructuary rather than possessory, in that he does not own the water but merely has a limited right to its use. (*Ibid.*)

Accordingly, the balance between state and private interests in water rights cases is markedly different than the balance in land use cases. Because the State retains a sovereign interest in water for public purposes, the state interest is qualitatively higher in water rights cases; and since the landowner lacks a fee interest, his reasonable expectations of non-interference are qualitatively different.[6] Therefore, any balancing of state and private interests in water rights cases would have to be presumptively struck in favor of the sovereign powers of the State.

The Ninth Circuit of course made no effort whatsoever to balance the competing interests of the State and the private parties. It held that *any* interference with "vested" rights is unconstitutional. For instance, although the decision mentions private expenditures made in contemplation of a continued right to divert waters to other watersheds (753 F.2d 1468, 1473) (impliedly *assuming* that such diversions will be prevented by the future application of *McBryde*), there is absolutely no mention of the public's interest in reasonable and beneficial use of the State's waters.

In contrast, the Supreme Court of Hawaii was acutely conscious of the implications of the arguments being advanced by the private parties. The import of these arguments, it said, was that "there existed no apparent common law restraint upon the right of private parties to drain rivers dry for whatever purposes they saw fit." (*Robinson v. Ariyoshi, supra*, 658 P.2d 287, 311.)

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[6] For cases bearing on the interrelationship between alleged regulatory takings and a property owner's "reasonable expectations" concerning his property, see *Penn Central Transp. Co., supra*, 438 U.S. at pp. 124-125, and the cases there cited: *United States v. Willow River Power Co.* (1945) 324 U.S. 499; *United States v. Chandler-Dunbar Water Power Co.* (1913) 229 U.S. 53; *Demorest v. City Bank Co.* (1944) 321 U.S. 36; and *Muhlker v. New York & Harlem Railroad Co.* (1905) 197 U.S. 544.

In rejecting the interpretation of prior case law proffered by the private parties, the state court concluded:

> "Such a system may have been deemed both appropriate and beneficial in other historical contexts. But this is no longer the case. The reassertion of dormant *public* interests in the diversion and application of Hawaii's waters has become essential with the increasing scarcity of the resource and recognition of the *public's* interests in the utilization and flow of those waters [footnote omitted]." (Emphasis added.) (*Ibid.*)

Concerning the other two aspects of the balancing approach used in the regulatory taking cases, the economic impact on the private party and the extent to which distinct investment-backed expectations have been interfered with, the lower court could not have considered these elements even had it attempted a balancing test. The balancing process of the regulatory taking cases involves no set formula and each case involves an essentially ad hoc inquiry, with the determination of whether a taking has occurred depending upon the particular circumstances of each case. (*Ruckelshaus v. Monsanto Co., supra,* 104 S.Ct. 2862, 2874-2875; *Penn Central Transp. Co. v. New York City, supra,* 438 U.S. 104, 124.) As stated in *Williamson County Regional Planning Comm'n v. Hamilton Bank, supra,* 105 S.Ct. 3108, 3119:

> "[The three factors] simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question."

As discussed under heading I above, the general principles set forth in *McBryde Sugar Company, Limited v. Robinson* have yet to be applied to individual landowners. Only then, when those principles are measured against the equities and evaluated for the possible exceptions to their application provided by the public use doctrine of Hawaii water law, will the balance between state and private interests be determined. It is not inconceivable that Hawaii courts may hold in future cases that a landowner's equitable interests or the public use doctrine will permit only a

modest adjustment of his past practices, or none at all. The question whether the landowners' rights have been unconstitutionally taken is thus not justiciable at this time. The Hawaii courts should have been allowed to determine the rights of individual landowners in subsequent proceedings.

CONCLUSION

The lower court disregarded established principles concerning justiciability to reach and decide the "taking" issue. Its decision conflicts with this Court's cases and gravely impairs the ability of the state courts to shape local law regarding a resource of vital importance to their citizens—water.

This Court should grant the petition and summarily reverse. Alternatively, the case should be set for plenary consideration.

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